9-4-2013

State v. Ash Appellant's Brief Dckt. 40565

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. MITCHELL CLIFFORD ASH, Defendant-Appellant.	NO. 40565 KOOTENAI COUNTY NO. CR 2008-21798 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

HONORABLE JOHN T. MITCHELL
District Judge

SARA B. THOMAS
State Appellate Public Defender
State of Idaho
I.S.B. #5867

ERIK R. LEHTINEN
Chief, Appellate Unit
I.S.B. #6247

SHAWN F. WILKERSON
Deputy State Appellate Public Defender
I.S.B. #8210
3050 N. Lake Harbor Lane, Suite 100
Boise, ID 83703
(208) 334-2712

ATTORNEYS FOR
DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR
PLAINTIFF-RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Additional Authorities

STATEMENT OF THE CASE

Nature of the Case

Mitchell Clifford Ash timely appeals from the district court's order revoking probation. On appeal, Mr. Ash argues that the Idaho Supreme Court denied him due process and equal protection when it refused to augment the record with various transcripts he requested be added to the record on appeal. Additionally, Mr. Ash argues that the district court abused its discretion when it revoked probation and failed to reduce his sentence *sua sponte* upon revoking probation.

Statement of the Facts and Course of Proceedings

Mr. Ash was charged, by information, with driving under the influence (*hereinafter,* DUI) of alcohol and a felony enhancement. (R., pp.72-73.) Pursuant to a plea agreement, Mr. Ash pleaded guilty to a felony DUI. (R., pp.87-88.) Thereafter, the district court imposed a unified sentence of three and one-half years, with one and one-half years fixed, but suspended the sentence and placed Mr. Ash on probation. (R., pp.97-101.)

After a period of probation, the State filed a report of probation violation alleging that Mr. Ash violated various terms of his probation. (R., pp.113-115.) Mr. Ash admitted to violating the terms of his probation for consuming alcohol, failing to complete substance abuse treatment, failing to get a mental health evaluation, failing to maintain full time employment, and failing to report to his probation officer for a scheduled meeting. (R., pp.113-115, 123-124.) The district court found Mr. Ash in violation of the terms of his probation, but continued his probation. (R., pp.128-130,

133-145.) As a term of his probation, Mr. Ash was required to complete mental health court. (R., pp.128-130, 133-135.)

During his second period of probation, the State filed a report of probation violation. (R., pp.178-180.) Mr. Ash admitted to violating the terms of his probation for being terminated from mental health court. (R., pp.178-180, 192-194.) The district court found that Mr. Ash had violated the terms of his probation, continued his probation, and made completion of mental health court a condition of his probation. (R., pp.195-197.)

During his third period of probation, the State filed a report of probation violation alleging that Mr. Ash violated the terms of his probation. (R., pp.215-217.) Mr. Ash admitted to violating the terms of his probation for getting terminated from mental health court and for consuming alcohol. (R., pp.215-217, 225-228.) The district court then revoked Mr. Ash's probation but retained jurisdiction. (R., pp.231-232.) Upon review of Mr. Ash's period of retained jurisdiction (*hereinafter,* rider), the district court suspended the sentence and placed Mr. Ash on probation. (R., pp.238-239, 241-242.)

During his fourth period of probation, the State filed a report of probation violation alleging that Mr. Ash violated the terms of his probation. (R., pp.275-278.) Mr. Ash admitted to violating the terms of his probation for getting terminated from mental health court and for consuming alcohol. (R., pp.275-278, 284-285.) The district court then revoked Mr. Ash's probation but retained jurisdiction. (R., 288-290.) While on his rider, Mr. Ash filed an Idaho Criminal Rule 35 (*hereinafter,* Rule 35) motion requesting leniency, which was denied by the district court. (R., pp.292-293, 298.) Upon review of Mr. Ash's rider, the district court suspended the sentence and placed Mr. Ash on probation. (R., pp.300-301, 303-304.)

During his fifth period probation, the State filed a report of probation violation alleging that Mr. Ash violated the terms of his probation. (R., pp.314-317.) Mr. Ash admitted to violating the terms of his probation for consuming alcohol and violating a no contact order. (R., pp.314-317, 325-326.) Thereafter, the district court revoked probation and executed the sentence without reduction. (R., pp.329-330.) Mr. Ash timely appeals. (R., pp.331-333.)

On appeal, Mr. Ash filed a motion to augment the record with various transcripts. (Motion to Augment, pp.1-4.) The State objected to Mr. Ash's request for the transcripts. (Objection to "Motion to Augment and to Suspend the Briefing Schedule and Statement in Support Thereof" (*hereinafter,* Objection to Motion to Augment), pp.1-5.) Thereafter, the Idaho Supreme Court entered an order denying his request for transcripts of the various hearings. (Order Denying Motion to Augment and to Suspend the Briefing Schedule (*hereinafter*, Order Denying Motion to Augment), pp.1-2.) Mr. Ash filed a renewed motion to augment with transcripts. (Renewed Motion to Augment, pp.1-5.) The State objected to Mr. Ash's renewed motion to augment. (Objection to Renewed Motion to Augment, pp.1-3.) The Idaho Supreme Court entered an order denying his request for transcripts of the probation violation hearing conducted on July 15, 2010, the probation violation hearing conducted on October 21, 2010, the jurisdictional review hearing conducted on February 24, 2011, the probation violation hearing conducted on September 15, 2011, the Rule 35 hearing conducted on November 9, 2011, and the rider review hearing conducted on July 19, 2012. (Order Denying *Renewed* Motion to Augment, p.1.)

ISSUES

1. Did the Idaho Supreme Court deny Mr. Ash due process and equal protection when it denied his Motion to Augment with transcripts necessary for review of the issues on appeal?

2. Did the district court abuse its discretion when it revoked Mr. Ash's probation?

3. Did the district court abuse its discretion when it failed to reduce his sentence *sua sponte* upon revoking probation?

ARGUMENT

I.

The Idaho Supreme Court Deny Mr. Ash Due Process And Equal Protection When It Denied His Motion To Augment With Transcripts Necessary For Review Of The Issues On Appeal

A. Introduction

The United States Supreme Court has repeatedly held that it is a violation of the Fourteenth Amendment's due process and equal protection clauses to deny an indigent defendant access to transcripts of proceedings which are relevant to issues the defendant intends to raise on appeal. In the event the record reflects a colorable need for a transcript, the only way a court can constitutionally preclude an indigent defendant from obtaining that transcript is if the State can prove that the transcript is irrelevant to the issues on appeal or if a sufficient substitute for the transcript exists.

In this case the Idaho Supreme Court denied Mr. Ash's request for transcripts of the probation violation hearing conducted on July 15, 2010, the probation violation hearing conducted on October 21, 2010, the jurisdictional review hearing conducted on February 24, 2011, the probation violation hearing conducted on September 15, 2011, the Rule 35 hearing conducted on November 9, 2011, and the rider review hearing conducted on July 19, 2012. On appeal, Mr. Ash is challenging the Idaho Supreme Court's denial of his request for these transcripts. Mr. Ash asserts that the requested transcripts are relevant to the issue of whether the district court abused its discretion when it failed to reduce his sentence *sua sponte* upon revoking probation because the applicable standard of review requires an appellate court to conduct an independent review of the entirety of the proceedings in order to evaluate the district court's

sentencing decisions. Therefore, the Idaho Supreme Court erred in denying his request.

B. The Idaho Supreme Court, By Failing To Provide Mr. Ash With Access To The Requested Transcripts, Has Denied Him Due Process And Equal Protection Because He Cannot Obtain A Merits Based Appellate Review Of His Sentencing Claims

The constitutions of both the United States and the State of Idaho guarantee a criminal defendant due process of law. *See* U.S. Const. amend. XIV; Idaho Const. art. I § 13.

> It is firmly established that due process requires notice and a meaningful opportunity to be heard. *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Cole v. Arkansas*, 333 U.S. 196 (1948). The Due Process Clause of the Fourteenth Amendment also protects against arbitrary and capricious acts of the government. *Godfrey v. Georgia*, 446 U.S. 420 (1980). Due process requires that judicial proceedings be "fundamentally fair." *Lassiter v. Department of Soc. Sec. Serv. of Durham Cty.*, 452 U.S. 18, 24 (1981).

State v. Card, 121 Idaho 425, 445 (1991) (*overruled on other grounds by State v. Wood*, 132 Idaho 88 (1998)). The Idaho Supreme Court has "applied the United States Supreme Court's standard for interpreting the due process clause of the United States Constitution to art. I, Section 13 of the Idaho Constitution." *Maresh v. State, Dept. of Health and Welfare ex rel. Caballero*, 132 Idaho 221, 227 (1998).

In Idaho, a criminal defendant's right to appeal is created by statute. *See* I.C. § 19-2801. Idaho statutes dictate that if an indigent defendant requests a relevant transcript, the transcript must be created at county expense. I.C. § 1-1105(2); I.C. § 19-863(a). Idaho court rules also address this issue. Idaho Criminal Rule 5.2 mandates the production of transcripts when requested by an indigent defendant. I.C.R. 5.2(a). Further, "[t]ranscripts may be requested of any hearing or proceeding before the court . . ." *Id.* Idaho Criminal Rule 54.7 further enables a district court to "order a transcript to

be prepared at county expense if the appellant is exempt from paying such a fee as provided by statute or law." I.C.R. 54.7(a).

An appeal from an order revoking probation is an appeal of right as defined in Idaho Appellate Rule 11. An order revoking probation is an order "made after judgment affecting substantial rights of the defendant." *State v. Dryden*, 105 Idaho 848, 852 (Ct. App. 1983). Additionally, an appeal from the denial of an Idaho Criminal Rule 35(b) (*hereinafter*, Rule 35) motion is an appeal as of right as defined by Idaho Appellate Rule 11(9). *See State v. Fuller*, 104 Idaho 891 (Ct. App. 1983) (holding an order denying a motion for reduction of sentence under Rule 35 is an appealable order pursuant to I.A.R. 11(c)(6)).

The United States Supreme Court has issued a long line of opinions directly addressing whether indigent defendants, who have a statutory right to an appeal, can require the state to pay for an appellate record including verbatim transcripts of the relevant proceedings. There are two fundamental themes which permeate these cases. The first theme is that the Fourteenth Amendment's due process and equal protection clauses are interpreted broadly. Any disparate treatment between indigent defendants and those with financial means is not tolerated. However, the second theme limits the states' obligation to provide indigent defendants with a record for review. The states do not have to provide indigent defendants with everything they request. In order to meet the constitutional mandates of due process and equal protection, the states must provide indigent defendants with an appellate record unless some or all of the requested material are unnecessary or frivolous.

The seminal opinion in this line of cases is *Griffin v. Illinois*, 351 U.S. 12 (1956). In that case, two indigent defendants "filed a motion in the trial court asking that a

certified copy of the entire record, including a stenographic transcript of the proceedings, be furnished [to] them without cost." *Griffin*, 351 U.S. at 13. At that time, the State of Illinois provided free transcripts for indigent defendants that had been sentenced to death, but required in all other criminal cases to purchase transcripts themselves. *Id.* at 14. The sole question before the United States Supreme Court was whether the denial of the requested transcripts to indigent non-death penalty defendants was a denial of due process and equal protection. *Id.* at 16.

The Supreme Court initially noted that "[p]roviding equal justice for poor and rich, weak and powerful alike is an age old problem." *Id.* "Both equal protection and due process emphasize the central aim of our entire judicial system-all people charged with crime must, so far as the law is concerned, 'stand on equal footing before the bar of justice in every American court.'" *Id.* at 17 (quoting *Chambers v. Florida*, 309 U.S. 227, 241 (1940)). "In criminal trials a State can no more discriminate on account of poverty than on the account of religion, race, or color." *Id.* The Supreme Court went on to hold as follows:

> There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations.

Id. at 18 (citations omitted). In order to satisfy the constitutional mandates of both due process and equal protection, an indigent defendant must be provided with a record which facilitates an effective, merits-related appellate review. At the same time, the

Supreme Court noted that a stenographic transcript is not necessary in instances where a less expensive, yet accurate, alternative exists. *Id.* at 20.

In *Burns v. Ohio*, 360 U.S. 252 (1959), the Supreme Court reaffirmed its holding in *Griffin* when it struck down a requirement that all appeals to the Ohio Supreme Court be accompanied with a requisite filing fee, regardless of the defendant's indigency. The United States Supreme Court held that "once the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty." *Id.* at 257. "This principle is no less applicable where the State has afforded an indigent defendant access to the first phase of its appellate procedure but has effectively foreclosed access to the second phase of that procedure solely because of his indigency." *Id.*

In *Draper v. Washington*, 372 U.S. 487 (1963), the Supreme Court addressed a procedure determining whether access to transcripts based on a frivolousness standard. "Under the present standard, ... they must convince the trial judge that their contentions of error have merit before they can obtain the free transcript necessary to prosecute their appeal." *Draper*, 327 U.S. at 494. The Court first expanded upon its holding in *Griffin*, that a stenographic transcript is not required if an equivalent alternative is available, by adding a relevancy requirement stating that "part or all of the stenographic transcript in certain cases will not be germane to consideration of the appeal, and a State will not be required to expend funds unnecessarily in such circumstances." *Id.* at 495. The Court went on to discuss the specific issues raised on appeal by the defendants to decide the relevance of the requested transcripts. The Court ultimately concluded that the issues raised by the defendants could not be

adequately reviewed without resorting to the stenographic transcripts of the trial proceedings. *Id.* at 497-99.

Mayer v. City of Chicago, 404 U.S. 189 (1971), extended the *Griffin* protections to defendants convicted of non-felony offenses, and placed the burden on the State to prove that the requests for verbatim transcripts are not relevant to the issues raised on appeal. In doing so, it held "where the grounds of appeal . . . make out a colorable need for a complete transcript, the burden is on the State to show that only a portion of the transcript or an 'alternative' will suffice for an effective appeal on those grounds. *Id* at 195.

This authority has been recognized by both the Idaho Supreme Court and the Idaho Court of Appeals. *See Gardner v. State*, 91 Idaho 909 (1967); *State v. Callaghan*, 143 Idaho 856 (Ct. App. 2006); *State v. Braaten*, 144 Idaho 60 (Ct. App. 2007).

If the record establishes that the requested transcripts are relevant to the issues on appeal, due process and equal protection mandate that those transcripts be created at the public's expense, unless the State can prove that the requested transcripts are not relevant to the issues on appeal.

C. The Requested Transcripts Are Relevant To Mr. Ash's Appeal Because He Is Challenging The Length Of His Sentence And The Applicable Standard Of Review Requires An Appellate Court To Independently Review The Entire Record Before The District Court

The requested transcripts are necessary for review of the issue raised in this appeal because they are within an Idaho appellate court's scope of review. "When we review a sentence that is ordered into execution following a period of probation, we will examine the *entire record* encompassing events before and after the original judgment.

We base our review upon the facts existing when the sentence was imposed as well as events occurring between the original sentencing and the revocation of probation." *State v. Hanington*, 148 Idaho 26, 28 (Ct. App. 2009) (emphasis added). In other words, an appellate court reviewing a district court's sentencing decision conducts an independent review of the entire record to determine if the record supports the district court's sentencing decisions. This standard of review is necessary in Idaho because judges are not required to state their sentencing rationale on the record. *State v. Nield*, 106 Idaho 665, 666 (1984).

The Idaho Court of Appeals has recently issued an opinion in *State v. Morgan*, 153 Idaho 618 (Ct. App. 2012), which addressed the scope of review of an appeal filed from an order revoking probation. In that case, the defendant pleaded guilty and was placed on probation. *Id.* at 619. After a period of probation, the defendant admitted to violating the terms of his probation and the district court revoked probation, but retained jurisdiction. *Id.* at 619-620. The defendant subsequently admitted to violating the terms of his probation and the district court revoked probation. *Id.* The defendant appealed from the district court's second order revoking probation. *Id.*

On appeal, the defendant filed a motion to augment the appellate record with transcripts associated with his first probation violation and disposition, which was denied by the Idaho Supreme Court. *Id.* The defendant then raised as issues on appeal the question of whether the Idaho Supreme Court denied him due process and equal protection when it denied the motion to augment and whether the district court abused its discretion when it revoked probation. *Id.* at 620-21. The Idaho Court of Appeals held that the transcripts of the prior probation proceedings were not necessary for the appeal because "they were not before the district court in the second probation violation

proceedings, and the district court gave no indication that it based its revocation decision upon anything that occurred during those proceedings." *Id.* at 621. The Court of Appeals then clarified the scope of review for a revocation determination. Specifically, it held:

> [I]n reviewing the propriety of a probation revocation, we will not arbitrarily confine ourselves to only those facts which arise after sentencing to the time of the revocation of probation However, that does not mean that *all* proceedings in the trial court up to and including sentencing are germane. The focus of the inquiry is the conduct underlying the trial court's decision to revoke probation. Thus, this Court will consider the elements of the record before the trial court relevant to the revocation of probation issues which are properly made part of the record on appeal.

Id. (original emphasis) (citation omitted).

The instant case is distinguishable because Morgan only challenged the order revoking probation and Mr. Ash is challenging the length of his sentence, which entails an analysis of "the entire record encompassing events before and after the original judgment. We base our review upon the facts existing when the sentence was imposed as well as events occurring between the original sentencing and the revocation of probation."[1] *Hanington*, 148 Idaho at 28. Furthermore, whether the transcripts of the

---

[1] In *Morgan*, the Court of Appeals refused to address Mr. Morgan's claim that the Idaho Supreme Court denied him due process on the basis that it does not have the power to overrule a decision by the Idaho Supreme Court. *Id.* at 621. The *Morgan* Court went on to state that it would have the authority to review a renewed motion to augment if it was filed with the Court of Appeals after the appeal was assigned to the Court of Appeals and contained information or argument which was not presented to the Idaho Supreme Court. *Id.* However, this position is untenable because the Idaho Appellate Rules require that all motions to augment be filed with the Supreme Court. The relevant portions of I.A.R. 30 follow:

> Any party may move the Supreme Court to augment or delete from the settled reporter's transcript or clerk's or agency's record.
>
> . . .

requested proceedings were before the district court at the time of the probation revocation hearing is not germane to the question of whether the transcripts are relevant to the issues on appeal because, in reaching a sentencing decision, a district court is not limited to considering only that information offered at the hearing from which the appeal was filed. Rather, the court is entitled to utilize knowledge gained from its own official position and observations. *See Downing v. State*, 136 Idaho 367, 373-74 (Ct. App. 2001); *see also State v. Sivak*, 105 Idaho 900, 907 (1983) (recognizing that the findings of the trial judge in sentencing are based, in part, upon what the court heard during trial); *State v. Wallace*, 98 Idaho 318 (1977) (recognizing that the court could rely upon "the number of certain types of criminal transactions that [the judge] has observed in the courts within its judicial district and the quantity of drugs therein involved"); *State v. Gibson*, 106 Idaho 491 (Ct. App. 1984) (approving sentencing court's reliance upon evidence presented at the preliminary hearing from a previously dismissed case because "the judge hardly could be expected to disregard what he already knew about Gibson from the other case"). Thus, whether the prior hearings were transcribed or not is irrelevant, because the court may rely upon the information is already knows from presiding over the prior hearings when it made the sentencing decision after revoking probation.

> Unless otherwise expressly ordered by the Supreme Court such motion shall be determined without oral argument. The reporter's transcript and clerk's or agency's record may also be augmented or portions deleted by stipulation of the parties and order of the Supreme Court.

(emphasis added). Therefore, the *Morgan* Court's statement that Mr. Morgan could have filed a renewed motion to augment directly with the Court of Appeals is contrary to the Idaho Appellate Rules. Mr. Ash recognizes that the Idaho Court of Appeals has recently rejected similar arguments in *State v. Cornelison*, 154 Idaho 793 (Ct. App. 2013). However, Mr. Ash disagrees with the holding in that case.

The rationale behind this position comports with the Idaho Court of Appeals' reasoning in *State v. Adams*, 115 Idaho 1053, 1055-56 (Ct. App. 1989), where the Court of Appeals explained why the appellate courts should look to the entire record when reviewing the executed sentence:

> [W]hen we review a sentence ordered into execution after probation has been revoked, we examine the entire record encompassing events before and after the original judgment. We adopt this scope of review for two reasons. First, the district judge, when deciding whether to order execution of the original sentence or of a reduced sentence, does not artificially segregate the facts into prejudgment and postjudgment categories. The judge naturally and quite properly remembers the entire course of events and considers all relevant facts in reaching a decision. When reviewing that decision, we should consider the same facts. Second, when a sentence is suspended and probation is granted, the defendant has scant reason, and no incentive, to appeal. Only if the probation is later revoked, and the sentence is ordered into execution, does the issue of an excessive sentence become genuinely meaningful. Were we to adopt the state's position that any claim of excessiveness is waived if not made on immediate appeal from the judgment pronouncing but suspending a sentence, defendants would be forced to file preventive appeals as a hedge against the risk that probation someday might be revoked. We see no reason to compel this hollow exercise. Neither do we wish to see the appellate system cluttered with such cases.

As such, when an appellant files an appeal from a sentence ordered after the revocation of probation the applicable standard of review requires an independent and comprehensive inquiry into the events which occurred prior to, as well as the events which occurred during, the probation revocation proceedings. The basis for this standard of review is that the district court "naturally and quite properly remembers the entire course of events and considers all relevant facts in reaching a decision." *Id.* It follows that, "[w]hen reviewing that decision, [an appellate court] should consider the same facts." *Id.* The Court of Appeals did not hold that the district court must expressly reference prior proceedings at the probation disposition hearing in order for this standard of review to become applicable. To the contrary, the Court of Appeals

presumed the judge would automatically consider prejudgment events when determining what sentence should be executed after revoking probation. Whether the prior hearings were transcribed or not is irrelevant, as an appellate court will presume that the district court will remember and consider the events from the prior proceedings when it executes a sentence after revoking probation.

In this case, Judge Gibler presided over the change of plea hearing, the sentencing hearing, the first probation violation admission hearing and the first probation violation disposition hearing. (R., pp.87, 94, 123, 128.) However, Judge Mitchell presided over all of the subsequent hearings in this matter. (R., p.191, 225, 238, 284, 296, 300, 325.) In his renewed motion to augment, Mr. Ash only requested transcripts of the hearings over which Judge Mitchell presided and is only challenging the denial of access to those transcripts on appeal. This is in accord with the *Adams* Opinion which held that an appellate court will presume Judge Mitchell relied on his memory of those proceedings when it executed Mr. Ash's sentences after revoking probation. Therefore, transcripts of those hearings will be necessary for an appellate court to review the merits of his appellate sentencing claims.

Since the requested transcripts are within the applicable standard of review, the Idaho Supreme court's decision to deny Mr. Ash access to those transcripts constitutes a due process and equal protection violation. In *Lane v. Brown*, 372 U.S. 477 (1963), a transcript was necessary to perfect an appeal and the appeal could be dismissed without the transcript. *Lane*, 327 U.S. at 478-81. Similarly, in Idaho, an appellant must provide an adequate record of face procedural default. "It is well established that an appellant bears the burden to provide an adequate record upon which the appellate court can review the merits of the claims of error, ... and where pertinent portions of

the record are missing on appeal, they are presumed to support the actions of the trial court." *State v. Coma*, 133 Idaho 29, 34 (Ct. App. 1999); *see also State v. Beason*, 119 Idaho 103, 105 (Ct. App. 1991); *State v. Murinko*, 108 Idaho 872, 873 (Ct. App. 1985). If the transcripts are missing, but the record contains court minutes that may be sufficient so that a meaningful review of an appellant's claim is possible, then the transcripts are not necessary for review even though the Court of Appeals as "strongly suggest[ed] that appellate counsel not rely on the district court minutes to provide . . . [a] record for [that] Court's review." *State v. Murphy*, 133 Idaho 489, 491 (Ct. App. 1999). If Mr. Ash fails to provide the appellate court with transcripts necessary for review of his claim, the legal presumption will apply and Mr. Ash's sentencing claims will not be addressed on their actual merits. If it is state action combined with Mr. Ash's indigency which prevents him from access to the necessary transcripts, then such action is a violation of the equal protection and due process clauses and any such presumption should no longer apply.

Moreover, the foregoing presumption should be reversed in this case, and what occurred at those hearings should be presumed to discredit the district court's final sentencing decision. When Mr. Ash was given the opportunity for multiple periods of probation, the district court must have found that the circumstances were right to give him an opportunity to be a member of society. To ignore the positive factors that were present at the previous hearings presents a negative, one-sided view of Mr. Ash. Denial of access to the requested transcripts has prevented Mr. Ash from addressing those positive factors in support of his appellate sentencing claims. In light of that denial, Mr. Ash argues that the events which occurred at the subject hearings should be presumed to invalidate the district court's final sentencing decisions in this matter.

In sum, there is a long line of cases which repeatedly hold it is a violation of both due process and equal protection to deny an indigent defendant transcripts necessary for a merits-based review on appeal. In this case, the requested transcripts are necessary to address the issues on appeal because the applicable standard of review of an appellate sentencing claim requires the appellate court to conduct an independent review of all of the proceedings before the district court. Under this standard of review, the focus is not on the district court's express sentencing rationale; to the contrary, the main question on appeal is if the record itself supports the district court's ultimate sentencing decision. As such, the decision to deny Mr. Ash's request for the transcripts will render his appeal meaningless because it will be presumed that the missing transcripts support the district court's sentencing decisions. This functions as a procedural bar to the review of Mr. Ash's appellate sentencing claims on the merits and, therefore, he should either be provided with the requested transcripts or the presumption should not be applied. Since Mr. Ash's request for the transcripts was denied, that presumption should be reversed in his favor.

D. The Idaho Supreme Court, By Failing To Provide Mr. Ash With Access To The Requested Transcripts, Has Denied Him Due Process Because He Cannot Obtain Effective Assistance Of Counsel On Appeal

In *Douglas v. California*, 372 U.S. 353 (1963), the United States Supreme Court relied on *Griffin*, *supra*, and its progeny and determined that the Equal Protection Clause of the Fourteenth Amendment requires the states to provide indigent defendants counsel on appeal. In *Evitts v. Lucey*, 469 U.S. 387 (1985), the Court recognized a due process right to effective assistance of counsel on appeal. According to the United States Supreme Court:

> In short, the promise of *Douglas* that a criminal defendant has a right to counsel on appeal-like the promise of *Gideon* that a criminal defendant has a right to counsel at trial would be a futile gesture unless it comprehended the right to effective assistance of counsel.

Evitts, 469 U.S. at 397.

The remaining issue is defining effective assistance of counsel. According to the United States Supreme Court, appellate counsel must make a conscientious examination of the case and file a brief in support of the best arguments to be made. *Anders v. California*, 386 U.S. 738, 744 (1967), held that the constitutional requirements of substantial equality and fair process "can only be attained where counsel acts as an active advocate on behalf of his client . . . . [Counsel's] role as advocate requires that he supports his client's appeal to the best of his ability." *See also Banuelos v. State*, 127 Idaho 860, 865 (Ct. App. 1995). In this case, the lack of access to the requested transcripts prevented appellate counsel from making a conscientious examination of the case and has potentially prevented appellate counsel from determining whether there is an additional issue to raise, or whether there is factual support either in favor of any argument to be made or undercutting an argument. Therefore, Mr. Ash has not obtained review of the court proceeding based on the merits and was not provided with effective assistance of counsel in that endeavor.

Furthermore, in *State v. Charboneau*, 116 Idaho 129, 137 (1989) (*overruled on other grounds by State v. Card*, 121 Idaho 425 (1991)), the Idaho Supreme Court held that the starting point for evaluating whether counsel renders effective assistance of counsel in a criminal action is the American Bar Association's "Standards For Criminal Justice, The Defense Function." These standards offer insight into the role and responsibilities of appellate counsel. Regarding appellate counsel, the standards state:

> Appellate counsel should give a client his or her best professional evaluation of the questions that might be presented on appeal. Counsel, when inquiring into the case, should consider all issues that might affect the validity of the judgment of conviction and sentence . . . . Counsel should advise on the probable outcome of a challenge to the conviction or sentence. Counsel should endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking substance.

Standards 4-8.3(b). In the absence of access to the requested transcripts, appellate counsel can neither make a professional evaluation of the questions that might be presented on appeal, nor consider all issues that might have affected the district court's sentencing determination at issue. Further, counsel is unable to advise Mr. Ash on the probable role the transcripts may play in the appeal.

Mr. Ash is entitled to effective assistance of counsel in this appeal, and effective counsel cannot be given in the absence of access to the relevant transcripts. Therefore, the Idaho Supreme Court has denied Mr. Ash his constitutional rights to due process and equal protection which include a right to effective assistance of counsel in this appeal. Accordingly, appellate counsel should be provided with access to the requested transcripts and should be allowed the opportunity to provide any necessary supplemental briefing raising issues or arguments which arise as a result of that review.

II.

The District Court Abused Its Discretion When It Revoked Mr. Ash's Probation

Mr. Ash asserts that, given any view of the facts, the district court abused its discretion when it revoked his probation. When a defendant appeals from an order revoking probation the Idaho Court of Appeals has utilized the following framework:

> The decision to revoke a defendant's probation on a suspended sentence is within the discretion of the district court. I.C. § 20-222. In a probation revocation proceeding, two threshold questions are posed: (1) did the probationer violate the terms of probation; and, if so, (2) should probation be revoked? *State v. Case,* 112 Idaho 1136 (Ct. App. 1987).

State v. Corder, 115 Idaho 1137, 1138 (Ct. App. 1989).

Mr. Ash is not challenging the district court's determination that he violated the terms of his probation. Accordingly, he only contests the district court's decision to revoke his probation. "A district court's decision to revoke probation will not be overturned on appeal absent a showing that the court abused its discretion." *State v. Sanchez*, 149 Idaho 102, 105 (2009). "When a district court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine whether the lower court correctly perceived the issue as one of discretion, acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it, and reached its decision by an exercise of reason." *State v. Knutsen*, 138 Idaho 918, 923 (Ct. App. 2003). "In deciding whether revocation of probation is the appropriate response to a violation, the court considers whether the probation is achieving the goal of rehabilitation and whether continued probation is consistent with the protection of society." *State v. Leach*, 135 Idaho 525, 529 (Ct. App. 2001).

Mr. Ash's was making positive steps during his most recent period of probation. However, he took on too many new responsibilities, which resulted in his probation violations. According to Mr. Ash:

> I think that I was doing a little bit too much . . . . I was going back to school. I was working full-time at Center Partners, and I was working overtime. I was . . . paying for my household . . . . I got [a] domestic violence evaluation and [a] mental health evaluation . . . .
> . . . .
>
> I want to be a good dad to Dylan. I've been taking parenting classes. I've been doing my circle of safety with him. Actually, I was working really, really close with my son, as much as I could be around him, and I was having a hard time . . . finding a place to go because . . . I'm working at the transitional house right now . . . .

(10/29/12 T., p.5, L.13 - p.7, Ls.16.) Trial counsel also indicated that Mr. Ash was prescribed medications to treat his ADHD, but he could not afford them. (10/29/12 Tr., p.11, Ls.10-25.)

Additionally, Mr. Ash has proven he can be successful on probation for extended periods of time. For example, Mr. Ash previously completed five years of supervised probation. (Presentence Investigation Report (*hereinafter,* PSI), p.7.)

In sum, Mr. Ash was focused on his rehabilitation while on his most recent period of probation, but had accepted too many responsibilities at one time. As such, the district court abused its discretion when it revoked probation.

III.

The District Court Abused Its Discretion When It Failed To Reduce Mr. Ash's Sentence *Sua Sponte* Upon Revoking Probation

Mr. Ash asserts that, given any view of the facts, his unified sentence of three and one-half years, with one and one-half years fixed is excessive. Due to the district court's power under I.C.R. 35 to reduce the length of the original sentence *sua sponte* upon the revocation of probation, on appeal an appellant can challenge the length of the sentence as being excessive. *State v. Jensen*, 138 Idaho 941, 944 (Ct. App. 2003). Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771 (Ct. App. 1982).

The Idaho Supreme Court has held that, "'[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.'" *State v. Jackson*, 130 Idaho 293, 294 (1997)

(quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Mr. Ash does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Ash must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* The governing criteria, or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.*

There are various mitigating factors which support the conclusion that Mr. Ash's sentence is excessively harsh. Specifically, There are various mitigating factors which support the conclusion that Mr. Ash's sentence is excessively harsh. Specifically, Mr. Ash was diagnosed with a recurrent and severe form of Major Depressive Disorder. (PSI, p.19.) While in mental health court, Mr. Ash maintained long period of sobriety. (R., pp.152.) Mr. Ash's mother loves him and provides support. (PSI, p.7.) Mr. Ash received support letters from his parents, thanking the district court for the treatment it afforded Mr. Ash. (PSI, pp.22-23.) According to Mr. Ash's mother, he was a good person and she thought it was unusually for him to be in trouble. (PSI, pp.7-8.) Mr. Ash completed high school and attended some college, but dropped out to help his mother recover from a car accident. (PSI, p.9.) Mr. Ash acknowledged that he has a problem with alcohol and the destructive role it has played in his life. (PSI, pp.28-30.)

In sum, there are various mitigating factors present in this matter which support the conclusion that Mr. Ash's sentence is excessively harsh.

CONCLUSION

Mr. Ash respectfully requests access to the requested transcripts and the opportunity to provide any necessary supplemental briefing raising issues or arguments which arise as a result of that review. In the event this request is denied, Mr. Ash requests that this case be remanded with instruction to place him on probation. Alternatively, Mr. Ash requests that the indeterminate portion of his sentence be reduced.

DATED this 4th day of September, 2013.

SHAWN F. WILKERSON
Deputy State Appellate Public Defender

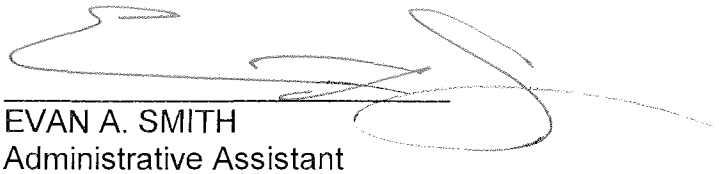
CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 4th day of September, 2013, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

MITCHELL CLIFFORD ASH
INMATE #55426
SICI
PO BOX 8509
BOISE ID 83707

JOHN T MITCHELL
DISTRICT COURT JUDGE
E-MAILED BRIEF

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720-0010
Hand delivered to Attorney General's mailbox at Supreme Court.



EVAN A. SMITH
Administrative Assistant

SFW/eas